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No. 98-455

In The

Supreme Court of the United States

October Term, 1998

GIANELLI MONEY PURCHASE PLAN AND TRUST, PENELOPE GIANELLI, TRUSTEE,

Petitioner,

v.

ADM INVESTOR SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the non-prevailing party to an arbitration be allowed to seize on a prior relationship between the arbitrator's employer and a non-party witness as a pretext for invalidating an arbitration award on the basis of "evident partiality" where the uncontroverted record demonstrates that the arbitrator had no actual knowledge of such relationship?

PARTIES TO THE PROCEEDING

The petition contains no list of the parties to the proceeding.

Archer Daniels Midland Company, a publicly traded company, is the corporate parent of respondent ADM Investor Services, Inc. There are no non-wholly owned subsidiaries of ADM Investor Services, Inc.

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CORRECTED STATEMENT OF THE CASE

I. The Arbitration Proceedings.

From late 1994 through mid-1995, Gianelli Money Purchase Plan and Trust, Penelope Gianelli, Trustee ("Gianelli") was a speculator in the commodity futures markets. Shortly after losing approximately $100,000, she filed a Statement of Claim with the American Arbitration Association ("AAA"), seeking to recoup those losses from her futures commission merchant, ADM Investor Services, Inc. ("ADM"). AAA's Commercial Rule 22 permits a party to " . . . be represented by counsel or other authorized representative." In the AAA proceeding, Gianelli was represented by the same law firm that appears on her Petition, and ADM was represented by the law firm of Neal, Gerber & Eisenberg ("NG&E"). Basic Commodities, Inc. ("Basic") is an introducing broker, which referred Gianelli's commodity trades to ADM for execution, clearance and confirmation. Neither Basic nor its president, Kent C. Kelley ("Kelley") was a party to the AAA proceedings, and this record contains no evidence that Kelley has ever been an officer, director or employee of ADM. Kelley was, however, a witness at the AAA hearing.

The wide-ranging allegations in Gianelli's AAA Statement of Claim included a reference to Basic and Kelley as respondents in a reparations claim (herein *"Neilson"*) previously heard and decided by an administrative law judge at the Commodity Futures Trading Commission. In responding to those allegations, ADM's AAA Answer (served on November 10, 1995) attached a complete copy of the *Neilson* decision. That attachment

disclosed that "Tracy A. Borgert, Esq. and G. Robertson Dilg, Esq., Orlando, Florida," attorneys affiliated with the Orlando law firm of Gray, Harris & Robinson ("Gray Harris"), had acted as attorneys for Kelley and Basic in *Neilson*.

Pursuant to AAA rules, the parties selected Keith W. Houck ("Houck") as the arbitrator to hear their dispute. Houck, a non-attorney, is Gray Harris' officer manager. That employment relationship was disclosed to the parties prior to his selection. On December 1, 1995, AAA sent a notice of appointment to Houck requesting that he:

> . . . disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or of any other kind. . . . If you are aware of such a relationship, please describe below.

In response to this request, Houck placed an "X" next to the statement "I HAVE NOTHING TO DISCLOSE." Later that month, and in response to her discovery request, ADM produced to Gianelli a contract between it and Basic. That contract, personally guaranteed by Kelley, contained indemnification and hold harmless provisions covering ADM's liability to customers introduced to it by Basic.

The arbitration proceeded to hearing on January 25 and 26, 1996, but there is no stenographic or other record of those proceedings. In an award dated February 7, 1996, Houck ruled in favor of ADM, denying Gianelli's claims in their entirety.

II. The Proceedings Before The District Court.

Alleging Houck's "evident partiality," Gianelli filed a petition to vacate in the district court on May 2, 1996. The petition alleged that it was not until after Houck rendered his award that Gianelli discovered past contacts between Kelley and Gray Harris attorneys relative to the formation and representation of various businesses, all of which preceded Houck's employment with Gray Harris. ADM's district court answer to the petition to vacate denied that Gianelli's discovery had been post-arbitral (these same businesses had been referred to in Gianelli's AAA Statement of Claim), and Gianelli offered no proof in the district court that the Gray Harris-Kelley connections had not been discovered until after Houck's award was rendered.

In pertinent part, Gianelli's petition to vacate alleged: "In all likelihood, only formal discovery from Gray Harris of all of its representation of Kelley and his affiliates will lead to the truth." Gianelli never initiated any discovery in the district court, and as a result, this record is devoid of evidence of Kelley's ownership interest, if any, in those businesses represented by Gray Harris and devoid of evidence of the amount of attorneys fees, if any, paid by Kelley or anyone else for Gray Harris' services. Nor does the record contain any evidence regarding Houck's duties, responsibilities, access to proprietary client information, or his financial compensation as Gray Harris' office manager.

The petition also placed at issue the content of a colloquy that had taken place at the commencement of

the AAA hearing among Gianelli's attorney, Houck and Kelley. Gianelli's petition alleged:

> 24. Thus, at the commencement of the arbitration hearing counsel raised this Gray Harris representation [*Neilson*] to Mr. Houck, Mr. Kelley and Kelley's counsel. Gianelli asked if Mr. Houck was aware of the representation. Additionally, they were asked if Gray Harris had done any other legal work for Mr. Kelley or his affiliates
>
> 25. Mr. Houck, the sole arbitrator, indicated he was unaware of [*Neilson*].
>
> 26. Mr. Kelley indicated [*Neilson*] was an isolated incident.

ADM's Answer to the Petition contested those allegations by responding:

> 24-25. ADMIS admits that, at the commencement of the arbitration hearing, Petitioner's counsel inquired of Mr. Houck concerning his knowledge of the Kelley case and of Mr. Kelley, individually, and that counsel further inquired of Mr. Kelley as to his knowledge of or relationship with Mr. Houck. ADMIS further admits that Mr. Houck stated in response to that inquiry that he had no knowledge of his firm's prior involvement in the Kelley case and that he had no prior knowledge of Mr. Kelley and had never communicated with Mr. Kelley in any respect at any time prior to the commencement of these proceedings. ADMIS further admits that, in response to the inquiry from Petitioner's counsel, Mr. Kelley stated that he and Mr. Houck were "ships passing in the night" and

> that he (Mr. Kelley) had never previously communicated in any fashion with Mr. Houck. Except as herein admitted, the allegations of paragraph 24 are denied.
>
> 26. The allegations of paragraph 26 are denied.

The petition was referred to a magistrate, who heard the argument of counsel for the parties on September 4, 1996. At that hearing, Counsel for Gianelli conceded that there was nothing to suggest any actual relationship between Houck and Kelley:

> THE COURT: IS THERE ANYTHING HERE TO SUGGEST ANY ACTUAL RELATIONSHIP BETWEEN MR. HAUK AND MR. KELLY (PH.SPLGS.)?
>
> MR. RISHOI: NO SIR, NO SIR, NO – NO, NOT THAT – OF COURSE AS THE OFFICE MANAGER – THE ALLEGATION IS THAT – THAT, WITH THE LAW FIRM AND WITH VARIOUS LAWYERS AT THE LAW FIRM AND, OF COURSE, I THINK AS AN OFFICE MANAGER MR. HAUK WOULD NOT HAVE HAD PERSONAL CONTACT WITH A CLIENT AND IF HE HAD HAD PERSONAL CONTACT WITH MR. KELLY WE CERTAINLY DON'T KNOW ABOUT IT AND I THINK IT WOULD BE UNIQUE, TO BE FRANK WITH THE COURT, IT WOULD BE UNIQUE IF HE DID HAVE A PERSONAL RELATIONSHIP.

This record is devoid of any evidence of any relationship between (1) any Gray Harris attorney and ADM or its corporate parent, (2) Houck or any other employee of Gray Harris and ADM or its corporate parent, (3) any Gray Harris attorney and ADM's representative, NG&E,

and (4) Houck or any other employee of Gray Harris and NG&E. Gianelli's petition to vacate did not claim, nor is there any evidence in this record, that Houck was actually biased against Gianelli.

The district court found that Houck was not actually biased and also accepted as true Houck's asserted lack of actual knowledge of any Gray-Harris relationship with Kelley. (Pet. 17a, 18a) It proceeded, however, to impose a duty of investigation, and used Houck's "failure" to fulfill that "duty" as the basis to vacate the award, even though the record before it was completely silent with regard to whether Houck had performed a conflicts check, and if so, what persons or entities he had investigated. (Pet. 19a) Finally, the district court accepted as true the allegations of paragraph 26 of the petition, even though ADM had denied those allegations and Gianelli had offered no proof in support of them.[1] (Pet. 14a, 17a, 18a)

III. The Proceedings Before The Eleventh Circuit.

On appeal, Gianelli argued that the vacatur of the arbitral award should be affirmed because it passed a geographically based "smell test." Gianelli reasoned that "the further a court is physically removed from an alleged odor the less apt it is to uncover the alleged partiality." No caselaw or other legal authority was cited for this proposition. ADM argued, as it had in the district court, that where the record shows an unequivocal lack of actual knowledge of the facts claimed to give rise to the

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[1] On appeal, this same error was repeated. (Pet. 3a)

alleged "evident partiality," the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") imposes no duty to investigate. ADM also argued that the district court's decision was in numerous respects devoid of support in the record, and that the Eleventh Circuit's "direct, definite and capable of demonstration" standard for vacatur of an award under the FAA could not be met by imputing knowledge from Gray Harris' lawyers to Houck, a mere partnership employee. The Eleventh Circuit reversed and remanded with instructions to grant ADM's cross-petition for confirmation of the award. (Pet. 11a) In so holding, the court found that the absence of actual bias by Houck and the absence of his actual knowledge of the undisclosed relationship between Kelley and Gray Harris precluded any conclusion that the award was tainted by "evident partiality." (Pet. 10a-11a)

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Decision Does Not Conflict With This Court's Holding In *Commonwealth Coatings*.

Gianelli attempts to expand the scope of this Court's ruling in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), to hold that it is appropriate to vacate an arbitration award on the basis of "evident partiality" by showing that the arbitrator "should have known he had an undisclosed conflict of interest." (Pet. 13) Thus, Gianelli asserts, the Eleventh Circuit's opinion is in "conflict" with *Commonwealth Coatings*. (Pet. 12) There is, however, no support for Gianelli's overly expansive reading of *Commonwealth Coatings*, which was a pure

"actual knowledge" case. In his concurring opinion, Justice White expressly noted the limited scope of this Court's ruling, stating that:

> . . . it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.

Id. at 151-52. Writing for the majority, Justice Black observed that:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Id. at 149. Both of these statements beg to be read in the context in which they were written: an arbitrator with actual knowledge of – and no need to "investigate" – a direct, ongoing business relationship with one of the parties had refused to disclose that relationship to the opposing party. Taking the word "requirement" completely out of the context of Justice Black's comments, Gianelli extrapolates that *Commonwealth Coatings* "requires" not only *disclosure* of "all dealings that might create an impression of possible bias," but also an *investigation* into facts previously unknown to the arbitrator that might give rise to such an impression. (Pet. 17) That broad-brushed reading extends *Commonwealth Coatings* far beyond its actual holding or any reasonable inferences that can be drawn from it.

Gianelli further distorts *Commonwealth Coatings* by asserting that there is a "similarity of the facts in *Commonwealth* and the instant case." (Pet. 13) Quite to the contrary, there is a blatant disparity in factual settings and, for that very reason, there was no need for *Commonwealth Coatings* to address – even indirectly – the true issue in the instant case. Similarly, there was no need for the Eleventh Circuit to even cite to *Commonwealth Coatings* in Gianelli. In *Commonwealth Coatings*, the arbitrator had actual knowledge of a relationship with an arbitration party but failed to disclose that fact prior to the hearing. Here, and as set forth above, Gianelli never even contested arbitrator Houck's lack of actual knowledge of his employer's prior relationship with a non-party agent of ADM. In *Commonwealth Coatings*, the arbitrator's direct and ongoing relationship with an arbitration party extended so far as to include the very dispute before the arbitration panel. Here, there is no relationship of any nature whatsoever between Houck and any party, any witness (including Kelley) or any law firm representing a party. The prior relationship between Houck's employer (Gray Harris) and a non-party agent of ADM was far removed from the subject-matter of the arbitration. In *Commonwealth Coatings*, the arbitrator's long-standing relationship with an arbitration party was ongoing. In *Gianelli*, the sporadic relationship between the Houck's employer and a non-party agent of ADM had ceased.

Gianelli next advances the supposition that it is too difficult for a non-prevailing party to unearth the truth about a relationship between his adversary and an arbitrator because unscrupulous arbitrators cover their tracks

and make the truth undiscoverable. Thus, Gianelli's argument goes, this case presents an ideal opportunity for this Court to extend the duty to disclose set forth in *Commonwealth Coatings* to encompass all arbitrators, those who are forthcoming as well as those attempting to gain personal advantage by carefully concealing favoritism and bias for one party over another. What is apparently lost on Gianelli is that this Court's standard, as articulated thirty years ago, *does* apply evenly to all arbitrators, regardless of state of mind. Simply put, all known facts must be disclosed. Here, arbitrator Houck met that standard; he did disclose what he knew. With respect to the Kelley-Gray Harris relationship, he knew absolutely nothing. Gianelli nevertheless waited until after the adverse award and then cried foul. Justice White anticipated that relationships may "come to light after the arbitration, when a suspicious or disgruntled party can seize on [a relationship] as a pretext for invalidating an award", yet did not require an arbitrator to do anything more, instead calling the assessment of an arbitrator's partiality a "role [ ] best consigned to the parties." 393 U.S. at 151. That is precisely what the Eleventh Circuit did in *Gianelli* – it left the assessment of Houck's partiality to Gianelli who took no steps to determine what, if anything, Houck knew but failed to disclose. Clearly, the Eleventh Circuit's decision in this case enjoys a peaceful coexistence with *Commonwealth Coatings*. Even if, as Gianelli suggests, this Court was "quite divided" in *Commonwealth Coatings* (Pet. 20), it certainly was not with respect to any issue that is presented here. *Commonwealth Coatings* has withstood the test of time over three decades, and the gross disparity in facts between it and this case

give rise to no reason for this Court to revisit its 1968 decision.

II. The Factual Record Of This Case Makes It An Unsuitable Vehicle To Address The Split In Circuit Authority.

The ultimate question that Gianelli would like to raise before this Court is who has the duty to investigate the background or relationships of an arbitrator, above and beyond those known facts that he clearly has a duty to disclose – is it the arbitrator or does that burden fall on the arbitration parties? Perhaps this question may be squarely presented in some other case, but it does not exist here. Just two years ago, this Court was presented with that very issue, but voted not to grant certiorari. *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir.), *cert. denied*, 117 S. Ct. 432, 136 L. Ed. 2d 331 (1996). In *Al-Harbi*, the arbitrator did not know that his former law firm had represented one of the parties on a matter unrelated to the arbitral dispute. The court held that there was no duty to investigate the existence of such a "relationship" and, therefore, the arbitrator's failure to investigate or disclose those facts did not constitute "evident partiality." The question presented for review in that case was:

> Does arbitrator have pre-arbitration duty to make reasonable investigation to discover and disclose conflicts of interest that may constitute "evident partiality" as that term is used in Federal Arbitration Act, 9 USC 10(a)(2)?

65 U.S.L.W. 3205 (October 1, 1996).

On a related issue – whether an attorney-arbitrator's failure to perform a proper conflicts check can constitute evident partiality – there is a split in authority among the Circuit Courts. In *Lifecare Intern., Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995), the Eleventh Circuit held that "evident partiality" can be found only where "either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exits." (Pet. 10a) On the other hand, in *Schmitz*, the Ninth Circuit held that an attorney-arbitrator's failure to investigate could, under certain circumstances, rise to the level of "evident partiality" and thereby require vacatur of an award. The award in *Schmitz* was vacated on the basis of evident partiality because the conflicts check performed by the attorney-arbitrator did not encompass a party's corporate parent for which his law firm had performed legal services.

Therein lies the "split": *Lifecare*'s two methods of demonstrating evident partiality versus yet a third alternative set forth in *Schmitz*; the Eleventh Circuit versus the Ninth Circuit. The Seventh and Fourth Circuits agree with the approach taken by the Eleventh Circuit. *See, Health Services Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 663 (7th Cir. 1983); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993). No other Circuit has embraced the Ninth Circuit's approach. Contrary to Gianelli's assertion, the Eighth Circuit does not join *Schmitz* in allowing vacatur of awards where the attorney-arbitrator "should have known" of a conflict between his law firm and an arbitration party. Gianelli claims that *Olson v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995), cites *Schmitz* "with approval" (Pet. 25), but *Olson* involved a failure to disclose actual knowledge (just as in *Commonwealth Coatings, supra*), and is clearly in harmony with the Eleventh Circuit's decision in *Middlesex Mutual Insurance Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982).

This Court need not expend its precious resources resolving the "conflict" between the instant case and *Schmitz* because the two cases are truly distinguishable. In *Schmitz*, as noted above, the court concluded that the attorney-arbitrator should have discovered his partners' work for the corporate parent of the arbitration respondent and, therefore, imposed constructive knowledge of that relationship on him. Here, if Houck, a non-attorney employee of a law firm, had performed precisely the type of conflicts check envisioned in *Schmitz* (perhaps he did – this record is, yet again, silent), he still would not have gained knowledge of the Gray Harris-Kelley relationship since it did not involve a party, the parent company of a party, or even a party's representative. Moreover, even if Houck had conducted an investigation that somehow unearthed the Gray Harris-Kelley relationship, there would still remain the question (not reached under the Eleventh Circuit's analysis) of whether that type of far more attenuated, prior "relationship" could meet the *Schmitz* standard for evident partiality.

If the divergence of opinion between *Lifecare* and *Schmitz* involves a truly recurring set of facts, then this Court will soon be presented with a case that provides the requisite record for a clear articulation of an attorney-

arbitrator's duty – if any – to investigate whether his firm has a real or potential conflict of interest and, in the absence of an investigation, under what circumstances knowledge of a "conflict" will nevertheless be imputed to him. *Gianelli* simply is not that case.

III. This Case Does Not Present An Opportunity To Resolve An Important Federal Question Of A Recurring Nature.

This case rests on unique circumstances that are not likely to recur. First, the "relationship" at issue here is an attenuated, indirect one between the arbitrator's employer and a party's agent. The agent's dealings with the arbitrator's employer were also utterly unrelated to the scope of the agency with the arbitration party. In other words, it is two steps removed from the typical direct "business dealings" that arbitrators are required to disclose. Second, arbitrator Houck's lack of actual knowledge is not disputed whereas, in the typical case, one party claims that the arbitrator actually possessed knowledge that went undisclosed. Third, the record below provides not even a hint as to what, if anything, arbitrator Houck actually did to satisfy any duty to investigate that may or may not be imposed under the FAA. Because Gianelli inexplicably, but deliberately, chose not to engage in "formal discovery" (the sole means by which she could have learned about arbitrator Houck's investigative efforts), this Court would be left only to surmise or assume with respect to those pivotal facts. Given the undeveloped record in the district court and the complete absence of an arbitral record, review of the Eleventh Circuit's decision would necessarily be confined to its

peculiar facts (and the absence of facts in the record). It is, therefore, unlikely that this Court's decision – whatever it might be – could provide significant guidance to lower courts.

Lastly, Gianelli has further muddied the waters by making unfounded accusations of fraud against Kelley. (Pet. ii) However, as observed in *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F.Supp. 107, 112 (D.D.C. 1976), there is not a whit of authority for the proposition that an arbitrator's decision should be set aside on the basis of evident partiality where a party (or a non-party witness) – not the arbitrator – knew but did not disclose facts that might have created an impression of possible bias. Gianelli's threatened "fraud" argument apparently emanates from the disputed colloquy at the outset of the arbitration hearing, of which there is no transcript or other record. Again, this record is devoid of the requisite facts that would enable the Court to make an informed assessment of the "fraud" allegations – belatedly raised for the first time in the Petition. The mere presence of the fraud allegations, however, makes this case even less suitable for further review because Gianelli could have (but did not) make this argument to the Eleventh Circuit.

IV. No Legitimate Policy Issue Favors Granting The Writ.

In a final effort to obtain further review of the Eleventh Circuit's decision, Gianelli invokes a disjointed public policy argument that the FAA must be construed consistently and, if possible, so as to encourage the use of arbitration. (Pet. 16-17, 22-23) ADM cannot envision how

the popularity of arbitration as an alternative dispute resolution forum could be enhanced if the Eleventh Circuit's decision was reversed. Parties such as ADM would be extremely reluctant to choose an arbitral forum if it was possible that a favorable award might be later set aside because the non-prevailing party had dredged up an attenuated relationship between the arbitrator's employer, a non-party representative, then used that information as the basis to claim "evident partiality" even though the arbitrator – and in this case ADM itself – at all times remained completely ignorant of the allegedly prejudicial relationship. Encouraging non-prevailing parties to engage in post-arbitral "sour grapes" fishing expeditions for any shred of a remote connection between the arbitrator and the prevailing party would increase the costs of arbitration, increase the frequency of judicial review of arbitration awards, and ultimately discourage the public's use of arbitration.

CONCLUSION

Gianelli is not inconsistent with, much less contrary to, the letter or the spirit of *Commonwealth Coatings*. If the FAA imposes a duty to investigate, *Gianelli* is not the dispute through which to address and resolve that issue because both the Eleventh Circuit's decision and this record are completely silent on the nature and extent of Houck's investigative efforts. As a necessary consequence of that silence, this Court's opinion would be purely advisory. Finally, no legitimate arbitral policy issue is presented by the petition. Gianelli argues only that this

Court should countenance her gambit that the legal fiction of constructive knowledge should be played as a trump card over admitted lack of knowledge, thereby voiding the result of an arbitral process that was, in fact, played by the rules. For each of the reasons stated above, the Petition should be denied.

Respectfully submitted,

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